July 2, 2007

Mr. Howard G. Borgstrom
Director, Business Operations Center
Office of the Chief Financial Officer
U.S. Department of Energy
Mailstop CF-60, Room 4A-221
1000 Independence Avenue, S.W.
Washington, DC 20585

RE: Supplemental Comments in response to Notice of Proposed Rulemaking on Loan Guarantees for Projects that Employ Innovative Technologies (RIN 1901-AB21), 72 *Federal Register* 27471 (May 16, 2007)

Dear Mr. Borgstrom:

Together with other major U.S. banking institutions, Goldman, Sachs & Co. has submitted to you under separate cover comments on the above-referenced Notice of Proposed Rulemaking (the "NOPR"). We fully concur with and support such comments, which highlight our primary concerns with respect to the proposed rule. We are providing these supplemental comments to offer more detail regarding and support for such primary concerns and to note some additional concerns.

We thought it important to provide more detail and support with respect to the concerns noted in the multi-bank letter in order to assist the Department of Energy (the "DOE") in incorporating the points raised in that letter into workable final regulations. DOE will undoubtedly be receiving numerous written comments highlighting the key concerns with the proposed rule, and has heard from several nuclear industry representatives on these topics. Perhaps the most difficult and important part of the process, however, is taking these concerns and turning them into viable legislation. We hope the detailed comments below, which include specific references to particular sections of the proposed rule, can assist in this process.

We also wanted to note some additional concerns we have with the proposed rule. From our participation in billions of dollars of project financings across industries with varying complex structures, we understand that often the seemingly less important issues ultimately hinder or derail a financing even if the headline issues have been addressed. Because of the importance of the loan guarantee program to the development and financing of viable clean energy sources, we want to make sure all impediments to financing are eliminated.

Finally, we have attempted in our supplemental comments to address concerns that go beyond the nuclear power industry, which is the focus of the multi-bank letter and the reports made by the industry speakers. While our primary focus is also on the nuclear power industry, we believe it is important that the final rule be workable across multiple sources of clean energy.

Respectfully submitted,

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Supplemental Comments Regarding the Department of Energy's Notice of Proposed Rulemaking on Loan Guarantees for Projects that Employ Innovative Technologies

Capitalized terms used but not defined herein have the meanings given to such terms in the NOPR. All section references are to sections of the proposed rule.

1. *The structural limitations contained in the NOPR prevent use of the loan guarantee program to create marketable financing vehicles.*

The NOPR provides that (a) a loan guarantee cannot cover more than 90% of the face value of the loans (see § 609.10(d)(3)), (b) the guaranteed portion of the loans cannot be separated or "stripped" from the non-guaranteed portion of the loans if the loans are participated, syndicated or otherwise resold in the secondary debt market (see § 609.10(d)(4)) and (c) the guaranteed obligations must have a first priority security interest in the project collateral, superior to any other project debt, including the non-guaranteed portion of the loans (see, among others, § 609.10(d)(10) and (13)).

The above requirements force the creation of a security that must be sold as a non-separable "unit" with 90% of the unit covered by the guarantee and 10% of the unit not covered by the guarantee. *This type of security is not marketable in the current financing environment.* First, the lending group that purchases debt obligations backed by government guarantees, insurance wraps or other similar credit support is largely distinct from the lending group that purchases non-guaranteed debt obligations of large-scale, risky infrastructure projects; in fact, the first lending group is often prohibited in its bylaws or investment guidelines from purchasing the non-guaranteed obligations and vice versa. Therefore, the prohibition against stripping effectively creates a security that cannot realistically be marketed to any lender group broad enough to absorb the significant financing needs of the nuclear power sector.

Second, even without the prohibition against stripping, the requirement that the non-guaranteed portion of the loans take a subordinated security interest in the project collateral results in a security that is not marketable in the current environment. Because of the significant cost involved in the construction of nuclear power facilities, the 10% non-guaranteed portion of the loans could be considerable. There is not presently sufficient appetite in the capital markets for a non-guaranteed debt instrument with a subordinated security interest in the collateral to meet the financing needs of the nuclear power sector. Project Sponsors would be forced to cover this gap with sponsor-level debt or parent guarantees, which would defeat the purpose behind the loan guarantee program of providing an economically viable way for energy companies to finance nuclear construction.

It is a cardinal rule of non-recourse financings of large infrastructure projects (i.e., "project financings") that lenders have a first priority security interest in the project assets. DOE's interpretation of Section 1702(g)(2)(B) of the Energy Policy Act as requiring the non-guaranteed portion of the loans and any other project debt to be subordinate to DOE's liens is too stringent of a reading of this provision. Section 1702(g)(2)(B) states that "with respect to any property acquired pursuant to a guarantee or related agreements, [the rights of DOE] shall be superior to the rights of any other person with respect to the property." This provision should be interpreted as giving DOE superior rights in the property acquired from the lenders through subrogation rights upon payment of the guaranteed obligations, as provided in

Section 609.15(g). Such subrogation rights, and not the exclusion of other first priority security interests, offer the appropriate structure for protecting DOE's interests while allowing for a viable financing structure.

Further, DOE's security interest should not extend to "other collateral or surety, including non project-related assets, determined by DOE to be necessary . . . " or to "additional collateral pledged as security for . . . other project debt." The guaranteed obligations should be secured by the project assets securing the guaranteed portion of the project debt (e.g., real property, equipment, contracts, permits, accounts) and not by unrelated collateral (e.g., capital stock of intermediate holding companies and parent companies, equity distributions), as such other collateral may be needed to secure other pieces of the financing structure, unless the Project Sponsor elects to include such other collateral in DOE's security package.

Even if DOE were to eliminate the prohibitions against stripping and pari passu first priority security interests, the loan guarantee program will not likely be viable for any significant portion of the nuclear sector's financing needs unless it allows for guarantees of 100% of the face value of the loans. The requirement of a 10% non-guaranteed portion creates a debt instrument that, if it is marketable at all, will be prohibitively expensive, thus defeating the economic purpose of the loan guarantee program. Expensive debt will also increase the Borrower's fixed cash charges, thus increasing the potential for default. Further, the existence of both guaranteed and non-guaranteed portions will create intercreditor issues that will significantly complicate the negotiation and documentation of the financing, without any true added benefit. DOE is protected by the 80% of Project Costs ceiling on the guaranteed debt.

In addition, DOE's concern that the 10% non-guaranteed portion is needed to make sure lenders have "skin in the game" and perform adequate due diligence is inconsistent with the realities of the capital markets. Even when debt instruments are backed by government guarantees and other forms of high-quality credit support, lenders and their counsel do not throw caution to the wind and abandon their diligence efforts. Lenders are by nature "downside animals" and will perform appropriate diligence notwithstanding the existence of a guarantee, and often their internal policies require them to do so. Finally, as in other government loan guarantee and similar programs, DOE itself will have an opportunity to perform its own independent diligence, and certainly is capable of doing so, including with the assistance of outside financial advisors, counsel, engineers and other experts.

Accordingly, we recommend that the final rule implementing the loan guarantee program (the "Final Rule") (i) allow for guarantees of 100% of the face value of the loans (limited by the 80% of Project Costs ceiling), (ii) allow for other pari passu first priority security interests in the project collateral and (iii) not extend DOE's security interest and subrogation rights beyond the project assets securing the guaranteed obligations.

2. *A minimum equity requirement will unnecessarily limit flexibility in structuring viable financings.*

The NOPR requires that the Project Sponsor make significant equity investments in the project (see §§ 609.7(a)(6) and (b)(7) and 609.10(d)(5)), and DOE invites comments on the merits of adopting a minimum equity percentage requirement. Mandating a minimum equity contribution will severely limit a Project Sponsor's flexibility in structuring a viable financing for a nuclear power facility or other project seeking to utilize the loan guarantee program. In the current market, the "equity" portion of a project financing is often provided through sponsor-level debt, structurally subordinated "mezzanine" debt, a letter of credit or other financial instrument. In addition, public power entities customarily issue debt to finance 100% of their project costs. Because of the significant capital requirements for construction of nuclear power facilities, Project Sponsors need to be nimble in the types of financing structures used, subject to acceptance in the capital markets. This flexibility will be eroded by a minimum equity requirement. Instead, DOE should rely on the 80% of Project Costs ceiling for the loan guarantee.

Accordingly, we recommend that the Final Rule not include any minimum equity requirement or similar requirement.

3. *The loan guarantee described in the NOPR is subject to conditions that will cause concern in the capital markets and do not establish a clear mechanism for payment of the guarantee in an event of default.*

Lenders will expect the loan guarantee to be an irrevocable, unconditional guarantee to pay the loan amounts when due. The NOPR provides that the lenders are entitled to make demands on the guarantee only for non-payment of principal and interest, and not upon acceleration resulting from other uncured defaults (see § 609.15(a) and (b)). Loan agreements in project finance transactions always contain numerous other defaults that are triggered upon the occurrence of significant negative events affecting the project (e.g., loss of material permits, significant casualty and condemnation events, bankruptcy of the Borrower), even if payments are still being made through reserve accounts, capitalization of interest, etc., and lenders expect to have the right to accelerate the loans and foreclose on the collateral if such defaults occur and are not cured. The language in the NOPR to the effect that the lenders cannot make a demand on the guarantee in the case of other defaults (unless DOE agrees that recovery should be allowed) will cause concern among certain lenders, thus potentially decreasing the pool of lenders willing to participate in financings of nuclear power facilities and other projects using the loan guarantee program.

The mechanism that will allow lenders to receive payment under the irrevocable, unconditional guarantee in an event of default will also have to be well defined, market-based, and court tested, in order for it to be relied on by the capital markets. For the purposes of precedence, we refer DOE to the monoline insurance market which provides credit enhancement to capital markets transactions and gives confidence to lenders that a monoline insured security will be paid in full, even under worst-case stress scenarios through a well established mechanism.

Further, the NOPR could be read as not allowing demands under the guarantee for failure to pay principal and interest if another default has also occurred (see § 609.15(b)—"In the event that the Borrower is in default as a result of a breach of one or more terms and conditions of the Loan Guarantee Agreement . . ., other than the Borrower's obligation to pay principal or interest . . ., the Holder will not be entitled to make demand for payment . . . ."). Hopefully, this issue can be addressed through a drafting clarification because, in the majority of cases in which the Borrower is unable to pay principal and/or interest, the Borrower is also in default under numerous other provisions of its loan agreement.

The NOPR also requires that the lenders provide "such supporting documentation as may be reasonably required to justify [a] demand [for payment]" (see § 609.15(e)). This requirement provides DOE with a level of discretion that will cause concern for lenders.

In addition, the NOPR provides that DOE may from time to time audit items included in Project Costs and may exclude or reduce the amount of any item that DOE determines to be unnecessary or excessive, or otherwise not to be an item of Project Costs (see § 609.17(b)). Lenders need to be assured that the Project Costs they agree to finance will be covered by the loan guarantee and they will not accept the level of discretion provided to DOE in the NOPR. DOE will be protected by the customary Borrower and independent engineer certification of Project Costs included with each loan disbursement.

Accordingly, we recommend that the Final Rule (i) specifically provide that the loan guarantee will be an irrevocable, unconditional guarantee, (ii) provide a clear mechanism for the payment of the guarantee that is market tested (e.g. monoline insurers) (iii) provide for the guarantee to be available in the case of acceleration upon the occurrence of other defaults without the need for a DOE determination of material effect and (iv) clarify that demands can be made on the guarantee for payment of principal and interest even when other defaults exist. We also recommend that Project Costs not be subject to DOE audit, exclusion or reduction, but rather be subject to an independent engineer certification.

4. The Final Rule should expressly allow loan guarantees to be available for nuclear power generating stations as well as for advanced technology low enriched uranium ("LEU") production facilities.

The NOPR defines an "Eligible Project" as a project that employs a "New or Significantly Improved Technology" that is not a "Commercial Technology" (see § 609.2), and provides both a number of projects alternative and a years of service alternative for what constitutes Commercial Technology. It is well understood that nuclear power presents one of the few, if not the only, economically viable and technically proven baseload sources of power that are also greenhouse-gas free. The historical barriers to financing of nuclear power facilities are not due to nascent, unproven technology. Instead, such barriers relate to high capital costs, lengthy construction periods, permitting risk, local opposition and political uncertainty – risks that can be significantly ameliorated with the loan guarantee program.

Additionally, advanced technology LEU production facilities (centrifugal enrichment and other technologies) are essential to fostering the domestic development of emissions-free, affordable base-load nuclear power generation. Centrifugal-based enrichment technology, for example, materially reduces the energy consumption and emissions resulting from uranium enrichment based on current gaseous diffusion technologies. With respect to nuclear power specifically, we believe this achieves DOE's stated objectives of fostering the "commercial use of new and improved technologies that will help sustain economic growth, yield environmental benefits, and produce a more stable and secure energy supply and economy for the United States."

As noted in the Introduction and Background section of the NOPR, "advanced nuclear energy facilities" represent one of the 10 categories of projects specifically addressed in the Energy Policy Act. Thus it makes sense to remove any uncertainty surrounding use of the loan guarantee program for nuclear power generating stations and advanced technology LEU production facilities instead of subjecting nuclear projects to the untested parameters for what constitutes an Eligible Project.

Accordingly, we recommend that the Final Rule expressly include nuclear power generating stations and advanced technology LEU production facilities in the definition of Eligible Project.

5. *The definition of "Project Costs" included in the NOPR is not consistent with the universe of project costs customarily financed in a project financing.*

Most significantly, the list of Project Costs covered by the proposed loan guarantee specifically excludes the "Credit Subsidy Cost" and the "Administrative Cost of Issuing a Loan Guarantee" (see § 609.12(c)(7)). The widely accepted custom in project financings is to have the project loans cover all costs associated with the construction of the project, including fees and expenses similar in type to the Credit Subsidy Cost and the Administrative Cost of Issuing a Loan Guarantee. To provide otherwise would require either the Project Sponsor to cover these amounts, thus eliminating the non-recourse nature of the financing, or the lenders to cover these amounts with a non-guaranteed loan, thus resulting in the problems described in detail above with respect to inclusion of a non-guaranteed tranche.

The definition of Project Costs in the NOPR also excludes other costs customarily included in project costs, including administrative services provided by affiliates (see § 609.12(c)(2)), development expenses or reimbursement thereof (see § 609.12(c)(5)) and pre-completion operation and maintenance costs (see § 609.12(c)(8)). Finally, likely more of a drafting matter than a substantive omission, the definition of Project Costs should include costs of "procurement" and "testing."

Accordingly, we recommend that the definition of Project Costs include (i) the Credit Subsidy Cost and the Administrative Cost of Issuing a Loan Guarantee, (ii) costs of administrative services provided by affiliates, (iii) development expenses, (iv) pre-completion operation and maintenance costs and (v) costs of procurement and testing.

6. *The NOPR does not adequately address the calculation of the Credit Subsidy Cost.*

The NOPR does not provide a clear, objective methodology for calculating the Credit Subsidy Cost. The level of this expense will be a key initial determinant for a Project Sponsor's decision whether or not to move forward with a project. In addition, the Credit Subsidy Cost must be reasonable and commercially viable, consistent with such costs included in other Federal loan guarantee programs.

Accordingly, we recommend that the Final Rule provide a clear, objective method for calculating the Credit Subsidy Cost that is consistent with other Federal loan guarantee programs.

7. *The limitation of the scope of the loan guarantee to principal and interest is not consistent with the customary scope of loan obligations in project financings.*

In several provisions, the NOPR provides that loan guarantees will cover only "principal and interest" (see, among others, §§ 609.2, 609.10(e)(1) and 609.15(a)). The customary definition of "obligations" in a project finance loan agreement includes all obligations of every nature of the Borrower under the loan documents, including without limitation principal, interest (including default interest and post-petition interest), reimbursement of letter of credit drawings, prepayment premiums, payments under interest rate hedging agreements, fees, expenses and indemnification payments. If a loan guarantee were to cover only principal and interest, the remainder of the "obligations" would effectively constitute a non-guaranteed portion of the loan, which would not be acceptable in the capital markets.

Accordingly, we recommend that the scope of obligations covered by loan guarantees include all Borrower obligations under the loan documents.

8. *The NOPR places on lenders obligations and liabilities that are inconsistent with the customary allocation of risks in a project financing.*

The NOPR requires the lenders to take on various obligations and liabilities that are more appropriately obligations and liabilities of the Borrower, including taking actions to preserve and protect the collateral and to maintain and perfect liens on the collateral, ensuring that the collateral package remains uncompromised, enforcing conditions precedent, exercising remedies against the collateral, providing reports regarding the project and the guaranteed obligations and maintaining records regarding the project (see §§ 609.10(d)(16), (e)(3), (e)(4) and (f)(1), 6.09.11(b), 6.09.16(a) and 609.17(a)(1)). Except in extremely limited and specialized circumstances, lenders are only liable for their gross negligence and willful misconduct. The Borrower is the entity liable for preserving the collateral and the liens thereon, and for providing reports and maintaining records. In addition, lenders often waive conditions precedent to funding and elect not to exercise remedies in certain circumstances. Lenders will simply not be able to enter into lending arrangements where they have obligations and liabilities beyond what is customary, and in many cases beyond what is permitted by their bylaws and policies.

Accordingly, we recommend that the Final Rule eliminate the obligations and liabilities of lenders described above.

9. *The NOPR includes certain conditions with timing that is inconsistent with the accepted timetable for a project financing.*

The NOPR appears to contemplate that the Eligible Lender(s) will be selected well in advance of the closing of the financing (see, among others, §§ 609.6(a)(26), 609.7(a)(4) and 609.8(a), (b) and (c)). While the sponsor will often have a financial advisor working with it during the preliminary stages of a financing, the lead lender or lenders will often not be formally selected until much further along in the process. A description of potential lenders would be more appropriate during the application stage.

The NOPR also contemplates that certain documents, including the debt commitment letter, the equity commitment letter, the closing checklist and legal opinions, be delivered during the loan guarantee application process (see §§ 609.4(f) and (g) and 609.6(b)(9), (15) and (18)). These documents are typically not provided until shortly before financial closing (debt commitment letter, closing checklist) or at financial closing (equity commitment letter, legal opinions).

The NOPR also contemplates that DOE set a closing date with the discretion to set a new closing date or terminate the guarantee commitment if all conditions precedent are not satisfied by the set closing date (see § 609.9(a) and (b)). Any project financing, especially one as complicated as a large-scale financing of a nuclear power facility, will have sometimes literally hundreds of conditions precedent that are subject to numerous uncertainties. Financings are also subject to market conditions that are beyond a borrower's or lender's control.

Finally, the NOPR contemplates that a term sheet with the final terms of the financing be executed at least 30 days prior to the financial closing date, and that DOE may extend the closing date or terminate the guarantee commitment if the final terms vary from the original terms submitted (see §§ 609.9(e) and (g)). In any project financing, the terms of the financing will inevitably change right through very close to the closing date, through borrower/sponsor/lender negotiations, marketing discussions with lenders, rating agency requirements or otherwise. Any such changes will be subject to agreement by DOE through negotiation of the Loan Guarantee Agreement. In addition, the negotiation and execution of a secondary term sheet will take valuable time away from negotiation of the definitive loan documents.

Accordingly, we recommend that the Final Rule (i) not require final selection of an Eligible Lender prior to closing, but instead require a description of potential lenders during the application process, (ii) not require delivery of financial closing documents until the closing date (i.e., as conditions precedent to closing the loan guarantee), (iii) not provide for a specific closing date to be set by DOE and (iv) not require the delivery of a final term sheet, but instead allow the final terms to be reflected in the negotiated Loan Guarantee Agreement.

10. *The loan guarantee program should not be dependent on DOE solicitation and should be streamlined.*

The NOPR requires DOE to issue a solicitation to commence the loan guarantee process (see § 609.3(a)). The financing of a nuclear power facility will require the coordination of numerous disparate resources and will be dependent on time factors beyond the control of the Project Sponsor. Project Sponsors will need maximum flexibility in working through the loan guarantee process. An open application process would be a better method for providing this flexibility.

In addition, the NOPR contemplates a complicated multi-step process for obtaining a loan guarantee—solicitation, potential Pre-Applications, Applications, issuance of initial Term Sheet, establishment of Conditional Commitment, potential Final Term Sheet and execution of Loan Guarantee Agreement (see §§ 609.3-609.10). Such a process should be streamlined so as not to slow the process of bringing financings to market for nuclear power facilities and other beneficial clean energy sources.

Accordingly, we recommend that the Final Rule (i) provide for an open application process instead of DOE solicitations and (ii) streamline the process to provide for submission of Applications, issuance of Conditional Commitments (which would include the key terms) and negotiation and execution of Loan Guarantee Agreements.

11. *Certain provisions of the NOPR are inconsistent with how loans are syndicated in the capital markets.*

The NOPR requires the Eligible Lender to provide written notification to DOE of any assignment, transfer, pledge or use of a Guaranteed Obligation (see §§ 609.10(g)(1)) and places restrictions and DOE consent rights on certain transfers. These provisions are not practical because the lead lender will need to assign and/or participate the loans to a large number of institutions very quickly. This flexibility is particularly important considering the significant capital needed for construction of a nuclear power facility. Lenders in the secondary market will then expect to trade their loans freely subject to applicable banking laws. To restrict assignments and participations of the guaranteed loans would significantly impair the liquidity of the market and thus the marketability of the loans. In addition, the lead lender needs the flexibility to resign from such position if necessary due to internal rules and policies.

In addition, the Final Rule should clarify that the provisions regarding the Eligible Lender apply only to the lead lender in a transaction, other than with respect to certain critical requirements (e.g., lenders cannot be debarred or suspended from participation in a Federal government contract; lenders cannot be delinquent on any Federal debt or loan). Only a relatively small number of lenders participating in a project financing would likely have "experience in originating and servicing loans for commercial projects similar in size and scope to the project under consideration" (see § 609.11(a)(5)) or "[b]e able to demonstrate experience or capability as the lead lender or underwriter by presenting evidence of its participation in other energy-related projects" (see § 609.11(a)(6)). In light of the expected financing needs for nuclear power facilities, it is important that the potential lending pool be as large as possible.

Accordingly, we recommend that the Final Rule (i) not include restrictions on transferability of the guaranteed loans and (ii) clarify that the provisions regarding the Eligible Lender apply only to the lead lender in a transaction.

12. *The requirement for a credit assessment from a nationally recognized rating agency is not practical or additive to the loan guarantee process.*

The NOPR requires an Application, when justified by the size and estimated cost of the project, to include a credit assessment for the project without a loan guarantee from a nationally recognized rating agency (see § 609.6(b)(21)) and requires a rating at least 30 days prior to the closing date for the Final Term Sheet without a guarantee (see § 609.9(f)). Obtaining a rating for any project is a long, time-consuming process that frequently consumes valuable time and resources during the most critical stages of negotiation. Further, the primary rating agencies often do not provide a final rating until all documents have been negotiated and closing is imminent, which would obviously occur well beyond the Application stage. The rating will also be highly dependent on the existence of the loan guarantee, and thus a rating without the guarantee will be of little substantive value. Certain Project Sponsors may elect to pursue a credit rating during the Application process, but it should not be a requirement. DOE would be much better served in terms of credit analysis through its own due diligence and with input from counsel, financial advisors, independent engineers and other experts.

Accordingly, we recommend that the requirement for a credit assessment be eliminated from the Final Rule.

13. *Reliance on multiple forms of governmental assistance should not be a negative factor in qualification for a loan guarantee.*

The NOPR provides that receipt of other forms of Federal and non-Federal assistance will be considered in evaluating Applications (see § 609.7(b)(9)) and notes in discussion that receipt of multiple forms will be a negative factor. It is highly likely that most new nuclear power facilities and other projects seeking to utilize the loan guarantee program, at least in the initial stages, will qualify for multiple forms of assistance—e.g., standby support, production tax credits, grants, insurance support. Such forms of assistance are intended to be complementary and should in fact enhance a project's attractiveness, not detract from it.

Accordingly, we recommend that multiple forms of governmental assistance not be a negative factor in consideration of a project for a loan guarantee.

14. *The Final Rule should recognize the customary requirements of financing structures involving multiple creditors.*

The NOPR appears to contemplate significant control of the financing by DOE to the exclusion of the lenders and the other creditors (see §§ 609.15(c), (d) and (l) and 609.16(a)). While it is expected and understood that DOE will need to have a fair amount of control to protect its interests, such control cannot be to the exclusion of other creditors. Financings of the nature required for construction of a nuclear power facility will involve numerous classes and types of creditors—e.g., the lenders, hedging counterparties, other contract counterparties, tax-exempt bondholders. It is not practical to expect such creditors to relinquish all control customarily afforded to them. It will be necessary for DOE to enter into an intercreditor agreement with other creditors to delineate the rights and remedies among DOE and such other creditors.

Accordingly, we recommend that the Final Rule recognize the existence and rights of other creditors in a project financing and indicate that DOE will enter into an acceptable intercreditor agreement.